

Lawyers Booted for Hiring Opponent's Expert

By Robert Ambrogi

Court opinions involving legal ethics and expert witnesses are few and far between. Those that come from a supreme court are even rarer. Thus, it was particularly notable when the North Carolina Supreme Court pulled two out-of-state plaintiffs' lawyers off a product liability case because of their inappropriate conduct in luring away their opponent's expert witness.

The ruling is made even more intriguing by the fact that a lower court in a different state looked at the same conduct by the same two lawyers and found nothing unethical in what they did.

For the North Carolina Supreme Court, the issue was whether to revoke the *pro hac vice* status of two lawyers who represented the plaintiffs in a lawsuit against Abbott Laboratories. The lawsuit alleged that powdered Similac infant formula contained the bacteria known as E. Sak and caused a prematurely born infant to contract a rare form of meningitis.

The factual trail that led to the ruling is somewhat complicated. Although it ends with the North Carolina high court, it started in Kentucky, with two E. Sak contamination cases brought by the same two plaintiffs' lawyers.

In the first of the two cases, *Hill v. University Medical Center*, the lawyers learned the identity of Abbott's expert. After the case settled, but before the court ordered it dismissed, the lawyers contacted the expert and retained him to consult on a different E. Sak case in Kentucky, *Froman v. University Medical Center*.

At the time they contacted the expert, they had not yet named Abbott as a party in the *Froman* case. However, they knew they would and they deliberately did not tell the expert. The lawyers later said that they intentionally wanted to keep the expert "in the black" about their plans to sue Abbott.

At the time of this contact, the expert was under a retainer agreement with Abbott to provide ongoing consulting services in E. Sak cases. The plaintiffs' lawyers did not know about the retainer agreement when they first contacted the expert. As a result of these maneuvers, the expert ended up employed by both sides in the *Froman* case.

Abbott responded to this state of affairs by asking the Kentucky trial judge to disqualify the two plaintiffs' lawyers from the case. Abbott contended that the attorneys violated ethical rules by contacting the expert in the earlier *Hill* case while it was still formally pending. The Kentucky judge found no "knowing violation" of ethics rules and declined to order sanctions.

Back to North Carolina

You might think that what happened in Kentucky would stay in Kentucky, but not in this case. Just a month before Abbott discovered the situation with its expert in the Kentucky case, a North Carolina court admitted the two plaintiffs' lawyers *pro hac vice* to represent the plaintiffs in this case.

In the North Carolina court, Abbott filed a motion asking the judge to revoke the two lawyers' admissions. The lawyers' actions in Kentucky, Abbott argued, had deprived it of the services of its retained expert and thereby crippled its ability to defend itself in the North Carolina lawsuit.

Siding with Abbott, the trial judge ruled that the attorneys' conduct in the Kentucky case required their disqualifications from the North Carolina case. The judge based his conclusion on the lawyers' actions in contacting Abbott's expert *ex parte* while the first case was still pending and in failing to disclose to the expert that their interests in retaining him were in conflict with his work for Abbott.

The two plaintiffs' lawyers appealed to the North Carolina Court of Appeals, which reversed the trial judge. The Court of Appeals reasoned that if a Kentucky judge had found that the lawyers' actions violated no ethical rules in that state, the same conduct could not subject them to discipline under North Carolina's Rules of Professional Conduct. Because the "predominant effect" of their conduct occurred in Kentucky, the court said, that state's rules should apply.

Up to the Supreme Court

This was the trail that brought the case ultimately to the North Carolina Supreme Court. Upon review of the case's full record, the Supreme Court disagreed with the Court of Appeals and reinstated the trial judge's order sanctioning the two lawyers.

The Supreme Court ruled that the Court of Appeals erred in basing its opinion on the Rules of Professional Conduct while failing to consider "the trial court's independent inherent authority to discipline attorneys." In exercising that authority, the trial court may consider conduct rules adopted by the state bar, but it is not limited by them, the Supreme Court said.

The trial judge's finding that the lawyers acted inappropriately by contacting the expert when he was not represented by counsel adequately supports the conclusion that the lawyers created an appearance of impropriety and acted inconsistently with the type of fair dealings expected of them, the Supreme Court found.

"The trial court displayed a nuanced understanding of the discretion accorded it under [North Carolina law]," the Supreme Court concluded. "Accordingly, we hold that the trial court was not acting under a 'misapprehension of law' when it reached its decision here."

Sidestepping a Key Question

Notably, the North Carolina Supreme Court stopped short of directly deciding a key issue in the case involving the interplay between legal ethics and expert witnesses.

The conclusion that the lawyers acted improperly hinged on North Carolina's professional conduct rule 4.3, regarding lawyers' dealings with unrepresented persons. "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding," the rule states.

The trial judge said the lawyers' actions were "inconsistent with fair dealings" as reflected by this rule. In agreeing with the judge, the Supreme Court said that it need not decide "the extent to which Rule 4.3 applies to expert witnesses" because "the trial court's carefully worded conclusion of law states only that counsel's conduct was inconsistent with it."

Whatever is to be made of that last statement, the import of the case is clear: Lawyers must be careful not to approach an opponent's expert at any stage of a pending case and must be up-front and unambiguous about the reason for approaching the expert.

The case is *Sisk v. Transylvania Community Hospital*, 364 N.C. 172 (N.C. 2010).

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